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PEMBINAAN BUKIT TIMAH SDN BHD v. HIFORM (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
YUSRIN FAIDZ YUSOFF JC
[ORIGINATING SUMMONS NO: WA-24NCC-525-09-2023]
16 APRIL 2024

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Abstract – *A creditor cannot effectively refuse partial payment as such payment is made in accordance with the law. If the creditor objects to the tender of a cheque, then the objection must be to the form of tender. If the objection is for any other reason, then tender of a cheque is a valid tender.*

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CIVIL PROCEDURE: *Injunction – Fortuna injunction – Application – Main contractor appointed subcontractor for project – Disagreement over payment between main contractor and subcontractor – Adjudicator issued adjudication decision in favour of subcontractor – Subcontractor refused to accept delivery of cheque by main contractor and indicated they would not accept payment of lesser sum – Subcontractor filed winding-up petition against main contractor – Whether winding-up petition had chance of success – Whether Fortuna injunction ought to be granted – Construction Industry Payment and Adjudication Act 2012*

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CONSTRUCTION LAW: *Adjudication – Adjudication decision – Main contractor appointed subcontractor – Disagreement over payment between main contractor and subcontractor – Adjudicator issued adjudication decision in favour of subcontractor – Main contractor failed to settle adjudicated sum – Subcontractor refused to accept delivery of cheque and indicated they would not accept payment of lesser sum – Whether subcontractor could refuse delivery of sum – Construction Industry Payment and Adjudication Act 2012 – Bills of Exchange Act 1949, ss. 2, 31(3), 45 & 74A*

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The present originating summons pertained to a *Fortuna* injunction aimed at restraining the defendant from taking further steps in the winding-up petition which was filed following an adjudication decision. The plaintiff was the main contractor appointed in a project. The plaintiff, in turn, appointed the defendant as a subcontractor to supply labour, materials, plants, machineries and all necessary tools and equipment for the said project. A disagreement over payment emerged, leading the defendant to initiate an adjudication proceeding under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'), seeking the sum of RM207,579.17 from the plaintiff. The adjudicator then issued the adjudication decision in the defendant's favour ('2023 adjudication decision'). As the plaintiff failed to settle the said sum, the defendant issued a statutory notice of demand, pursuant to s. 466(1) of the Companies Act 2016 ('CA') ('s. 466(1) notice'), to the plaintiff, demanding the payment of the adjudicated sum with interest and costs, in the aggregate sum of RM93,180.53. The plaintiff issued a cheque, being payment

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towards the adjudicated sum of RM51,894.80 only and requested the plaintiff to retract the s. 466(1) notice. The defendant refused to accept delivery of the cheque and indicated that they would not accept any payment less than the aggregate sum of RM93,180.53. Unbeknownst to the plaintiff, the defendant had filed a winding-up petition against the plaintiff at the High Court. The plaintiff thereafter filed this originating summons. The plaintiff had deposited the cheque in the sum of RM51,894.80 into the plaintiff's solicitors' account and the said sum was currently being held by the plaintiff's solicitors on a stakeholder basis. In opposing the application, the defendant contended that: (i) the winding-up would succeed as the 2023 adjudication decision had not been set aside; (ii) such debt was not disputed; (iii) although the plaintiff claimed to be able to pay, they just simply refused to do so; (iv) the plaintiff did not come to the court with clean hands. A previous adjudication decision ('2020 adjudication decision') was referred to wherein it was alleged that the plaintiff had a tendency of deliberately causing hardship and depriving the defendant of its fruits of litigation by delaying payment towards the resultant costs orders of the High Court for the sum of RM20,000. The delay necessitated the filing of a garnishee proceeding against the plaintiff which was subsequently postponed due to cheque clearance issues; and (v) they were entitled to reject the tender of the cheque for the partial payment of the adjudicated sum and insist on the full sum to be paid on or before 15 September 2023 and therefore, the failure to satisfy the sum of RM93,180.53 by the due date entitled them to file the winding-up petition.

Held (allowing application):

(1) The plaintiff's habit of delaying payment in matters relating to their failure to register and enforce the 2020 adjudication decision had no immediate relation to their decision to partially pay for the 2023 adjudication decision and thereafter, seeking to injunct the defendant from winding them up. Even if it was to be construed in its general sense, *ie*, the plaintiff was in the habit of delaying payment, such delay, *albeit* frustrating and annoying was part of a normal litigation process and did not constitute a deliberate attempt to manipulate the matter at issue or to gain unfair advantage. Simply because the plaintiff had behaved poorly did not necessarily mean that they had dirtied their hands. Such conduct on its own sets of facts did not violate the 'clean hands' principle. (para 33)

(2) The defendant had actively refused the plaintiff's delivery of the sum due as the cheque issued was for a lesser sum. Nevertheless, the defendant did not object on the form or mode of payment. According to s. 31(3) of the Bills of Exchange Act 1949 ('BEA'), 'a bill payable to order is negotiated by the indorsement of the holder completed by delivery'. Delivery under s. 2 of the BEA meant 'transfer of possession, actual or constructive, from one person to another'. Here, despite the

active refusal by the defendant's solicitors to accept delivery, the plaintiff took steps in directly depositing the said cheque into the defendant's bank account. Such action amounted to delivery under s. 2 of the BEA wherein the subsequent clearing process by Bank Negara's cheque truncation and conversion system or eSPICK amounted to presentment for acceptance under ss. 45 and 74A of the BEA. Therefore, tendering the cheque by depositing it into the CDM constituted valid delivery and presentment, re-affirming the plaintiff's assertion that they had effectively made partial payment, reducing the outstanding sum to RM41,285.73. (para 35)

(3) The payment by the plaintiff was complete at the time when the cheque was deposited into the CDM maintained by the defendant's bankers, *ie*, at 6.35pm on Friday, 15 September 2023. This was well before the expiry of the 21-day period which took place at 12 midnight on the same day. It did not matter that the presentment and clearance of funds took place a few days after it was delivered and/or tendered. The defendant's act of 'refunding' the sum indicated that the said cheque had indeed cleared into their bank account. As such, it was not disputed that the condition under the cheque rule was met and the sum of RM51,894.80 was deemed paid on 15 September 2023. The plaintiff's part payment towards the statutory demand, causing the outstanding debt falling below the statutory threshold before the expiry of the 21-day notice period, would result in s. 466(1) of the CA no longer being a valid ground to wind up its entity. Hence, the petition filed by the defendant against the plaintiff was bound to fail. (paras 43 & 51)

(4) The petition had no chance of success, as a matter of law as well as a matter of fact and the continuation of such petition might produce irreparable damage to the company. A just and equitable balance had to be struck between the rights of the defendant in collecting their cashflow expeditiously and the rights of the plaintiff to make the necessary payment to reduce their debt to avoid being wound up. The *Fortuna* injunction should also preserve the defendant's right to enforce the 2023 adjudication decision by applying to the High Court for an order to enforce the same pursuant to s. 28 of the CIPAA and the right to execute the same in accordance to O. 45 to O. 51 of the Rules of Court 2012. (para 55)

(5) The present case fell within the rare and exceptional case for such injunction may be filed and considered in courts other than the winding-up court. This was so as the defendant's act of refusing payment and thereafter refusing the sum paid was made in order to maintain their right to file and proceed with the winding-up petition was a clear abuse of process. The defendant did not promptly inform them of the returned adjudicated sum. This information only came to light two days after the

defendant had surreptitiously presented the winding-up petition. This tactic was deemed to be in bad faith. The steps taken by the defendant in rejecting the cheque delivery and thereafter refunding the plaintiff's part payment amounted to an abuse of proceeding as the petition was utilised as an execution or enforcement proceeding. (paras 72 & 73)

(6) The court granted order in the following terms: (i) declaration that the s. 466(1) notice which was served on the plaintiff was null and void or otherwise invalid; (ii) an injunction be granted to restrain the defendant from advertising the petition and to stay the said petition from proceeding; (iii) an injunction be granted to restrain the defendant from using or relying upon the notice for the purpose of commencing any winding-up proceeding against the plaintiff until the arbitrator's decision on the plaintiff's cross-claim or set off; (iv) the sum of RM51,894.80 currently held by the plaintiff's solicitors be released to the defendant forthwith; and (v) the abovementioned orders shall not prejudice any right which the defendant may have in taking execution proceedings for enforcement of any court judgment which the court may grant to the defendant in the proceeding for the registration of the adjudication decision as a court order or judgment. (para 76)

Case(s) referred to:

Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd [2002] 4 CLJ 391 HC ***(refd)***
Bottomley The Younger v. Robert Nuttall [1858] 5 CB (NS) ***(refd)***
Cotton Corporation Of India v. United Industrial Bank [1983] AIR 1272 ***(refd)***
Dering v. Earl Of Winchelsea [1787] 1 Cox Eq Cas 318 ***(refd)***
Fortuna Holdings Pty Ltd v. The Deputy Commissioner Of Taxation Of The Commonwealth Of Australia [1978] VR 83 ***(refd)***
Grobbelaar v. News Group Newspapers Ltd & Anor [2002] 4 All ER 732 ***(refd)***
Holman v. Johnson (1775) 1 Cowp 341 ***(refd)***
Homes v. Smith [2000] Lloyd's Rep Bank 139 ***(refd)***
Josu Engineering Construction Sdn Bhd v. TSR Bina Sdn Bhd [2013] 9 CLJ 650 HC ***(refd)***
Klass Corporation (M) Sdn Bhd v. MKRS Management Sdn Bhd [2018] 7 CLJ 303 HC ***(refd)***
Likas Bay Precinct Sdn Bhd v. Bina Puri Sdn Bhd [2019] 3 CLJ 499 CA ***(refd)***
Lord Krishna Sugar Mills Ltd & Anor v. Smt Abnash Kaur & Ors [1961] 31 COM CAS 639 ***(refd)***
Metalform Asia Pte Ltd v. Holland Leedon Pte Ltd [2007] SGCA 6 ***(refd)***
Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***
National Conduits (P) Ltd v. S S Arora [1968] AIR 279 ***(refd)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
Pengkalen Holiday Resort Sdn Bhd v. Perbadanan Pengurusan Paradise Lagoon Apartment (North) & Anor [2016] CLJU 1114; [2016] 1 LNS 1114 HC ***(refd)***
People Realty Sdn Bhd v. Red Rock Construction Sdn Bhd [2008] 1 CLJ 632 CA ***(refd)***
Permata Trans Offshore Sdn Bhd v. New Wing Energy Sdn Bhd [2019] CLJU 1273; [2019] 1 LNS 1273 HC ***(refd)***
Petroleo Brasileiro SA v. ENE Kos 1 Ltd [2009] EWCA Civ 1127 ***(refd)***

Polglass v. Oliver (1831) 2 Cr & J 15 ***(refd)***
RHB Bank Bhd v. Malaysia Pacific Corporation Bhd & Another Appeal [2018] 6 CLJ 55 CA ***(refd)***
Sanjung Suria Sdn Bhd v. PLB-KH Bina Sdn Bhd [2013] CLJU 1004; [2013] 1 LNS 1004 HC ***(refd)***
Sime Darby Energy Solution Sdn Bhd v. RZH Setia Jaya Sdn Bhd [2021] 9 CLJ 880 CA ***(refd)***
SME Majujaya Sdn Bhd v. Oon Brothers Electrical Trading Co Sdn Bhd [2018] CLJU 945; [2018] 1 LNS 945 HC ***(refd)***
Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd (Formerly Known As Tong Teik Pte Ltd) [2021] SGCA 60 ***(refd)***
Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd [2002] 1 CLJ 566 CA ***(refd)***
United Malaya Stores Sdn Bhd v. S Selapa Sivalingam & Anor [2022] 6 CLJ 469 HC ***(refd)***
Wangsini Sdn Bhd v. Grand United Holdings Bhd [1997] 5 CLJ 664 HC ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, ss. 2, 31(3), 45, 74A
Companies (Winding-up) Rules 1972, rr. 19, 24, 193
Companies Act 2016, ss. 351, 465(1)(e), 466(1)(a), (b), 469(3), 470(1)
Construction Industry Payment and Adjudication Act 2012, ss. 15, 28
Rules of Court 2012, O. 45, O. 46, O. 47, O. 48, O. 49, O. 50, O. 51
The Companies (Court) Rules 1959 [Ind], r. 96

For the plaintiff - Wayne Siang; M/s Wayne Siang, Kai & Co
For the defendant - Cheong Su Yin & Tan Zhi Ching; M/s Cheong Su Yin & Co

Reported by Lina E

JUDGMENT

Yusrin Faidz Yusoff JC:

Introduction

[1] The matter at hand pertains to a *Fortuna* injunction aimed at restraining the defendant from taking further steps in the winding-up petition, which was filed on 20 September 2023 following an adjudication decision dated 26 July 2023. The winding-up petition was filed despite the plaintiff making part payment towards the amount due within the 21-day period, which renders the outstanding debt to fall below the statutory threshold.

[2] The matter came up before Liza Chan Sow Keng J on 2 October 2023, wherein Her Ladyship had judiciously directed that the originating summons in encl. 1 be heard together with the notice of application for *ex parte* injunction in encl. 2. The ultimate result of encl. 1 would therefore render encl. 2 academic.

[3] I heard the application on 30 November 2023 and reserved my decision. Upon full consideration of the facts and the applicable law, I had on 7 December 2023 allowed the plaintiff's application and issued the injunction sought and granted order in terms of the plaintiff's originating summons with no order as to costs. This judgment is prepared for the defendant's appeal based on their notice of appeal dated 2 January 2024.

Background Facts

[4] The plaintiff was the main contractor appointed in a project known as "Project Rapid Transit Lembah Klang: Jajaran Sungai Buloh-Kajang Package DPT2: Construction And Completion Of Kajang Maintenance Depot, External Works And Other Associated Works (Contract No. MRTCORP/ KVMRT-SBK/ELE/DPT2/133." In turn, the plaintiff appointed the defendant as a subcontractor to supply labour, materials, plants, machineries and all necessary tools and equipment for the said project.

[5] Subsequently, a disagreement over payment emerged, leading the defendant to initiate an adjudication proceeding under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"), seeking the sum of RM207,579.17 from the plaintiff.

[6] On 26 July 2023, the adjudicator issued the adjudication decision, ordered, *inter alia*, the following:

(i) the plaintiff shall pay the defendant the adjudicated sum of RM51,894 ("adjudicated sum");

(ii) the plaintiff to pay the costs of adjudication for RM31,162.67 ("adjudication cost");

(iii) the plaintiff to pay the defendant the adjudicated sum and adjudication cost within two weeks from the decision date in a form of secured financial instruments; and

(iv) the plaintiff to pay the defendant simple interest of 5% per annum on the adjudicated sum from 30 August 2019 until the full payment of the adjudicated sum.

(Referred to as '2023 adjudication decision').

[7] As the plaintiff failed to settle the said sum, the defendant, through Messrs Cheong Su Yin & Co ("defendant's solicitors"), issued a statutory notice of demand pursuant to s. 466(1)(a) of the Companies Act 2016 to the plaintiff on 25 August 2023, demanding for the payment of the adjudicated sum with interest and costs in the aggregate sum of RM93,180.53 within 21 days *ie*, on or before 15 September 2023. (PDF pp. 43 to 57, exh. P4 of encl. 3).

[8] The plaintiff, *vide* their solicitors' letter dated 14 September 2023, issued a cheque (UOB Cheque No. 799848 dated 11 September 2023) being payment towards the adjudicated sum of RM51,894.80 only, and therefore, requested the plaintiff to retract the s. 466(1)(b) notice, (PDF pp. 58 to 59, exh. P4 of encl. 3).

[9] On 15 September 2023, the defendant's solicitors refused to accept delivery of the cheque contained in the said letter dated 14 September 2023, wherein the plaintiff had on 15 September 2023, at 6.35pm, deposited the said cheque into the defendant's bank account *via* a cheque deposit machine ("CDM") located at CIMB Bank's Solaris Mont' Kiara branch.

[10] In the defendant's solicitors' rejection letter dated 15 September 2023, the defendant indicated that they would not accept any payment less than the aggregate sum of RM93,180.53. (PDF p. 60, exh. P4 of encl. 3).

[11] In a letter dated 15 September 2023 (pdf pp. 61 to 65, exh. P4 of encl. 3), as their initial letter dated 14 September 2023 was rejected, the plaintiff's solicitors notified the defendant's solicitors of the following:

(i) the defendant cannot refuse the said cheque;

(ii) the defendant's solicitors are obligated to accept document service according to Bar Council Rules and Rulings 14.05; and

(iii) the plaintiff has initiated the process of depositing the cheque for the adjudicated sum into the defendant's CIMB Account No. 8600932872, wherein a cheque deposit slip dated 15 September 2023 was enclosed.

[12] Unbeknownst to the plaintiff, the defendant had, on 20 September 2023, filed a winding-up petition against them at the Kuala Lumpur High Court (Winding-up Petition No. WA-28NCC-943-09-2023).

[13] Two days after the winding-up petition was filed, the defendant's solicitors issued a letter dated 22 September 2023 to reiterate that their client has reasonable grounds to refuse payment of any amount less than RM93,180.53, and therefore have duly returned the sum of RM51,894.80 to the plaintiff *via* a payment advice dated 19 September 2023. In the said letter, the defendant's solicitors informed that they had already filed the winding-up petition against the plaintiff (PDF pp. 67 to 68, exh. P5 of encl. 3).

[14] The plaintiff thereafter filed this originating summons on 22 September 2023 seeking the following relief:

(i) an injunction be granted to restrain the defendant whether by themselves, their employees, representatives, agents or solicitors from proceeding with the winding-up petition including but not limited to the service, advertising, gazetting or publishing the said petition to any third party;

(ii) costs on an indemnity basis; and

(iii) further and/or any other relief deemed fit.

[15] On 14 November 2023, the plaintiff deposited their UOB Cheque No. 309227 dated 10 November 2023 in the sum of RM51,894.80 into the plaintiff's solicitors' account. The said sum is currently being held by the plaintiff's solicitors on a stakeholder basis, (PDF pp. 5 to 7, exh. P1A of encl. 11).

Preliminary Objection

[16] The defendant's solicitors took objection to the plaintiff's filing of their supplementary affidavit (encl. 11), which they claimed to be filed out of time as it was directed that all affidavits to be exhausted six weeks from 2 October 2023 *ie*, by 13 November 2023.

[17] The said encl. 11, filed on 15 November 2023, attests to the additional information that the plaintiff, in good faith, deposited the refunded adjudicated sum of RM51,894.80 to their solicitors, Messrs Wayne Siang, Kai & Co, who now acts as stakeholder for the said sum.

[18] Since the directions were issued by Liza Chan Sow Keng J prior to her retirement, I took the liberty to review the records, where I discovered that Her Ladyship had instructed that the filing of affidavits should be completed by "mid-November 2023." There is no direction issued for it to be finalised within six weeks from 2 October 2023. Hence, I am of the view that the supplementary affidavit filed on 15 November 2023, was filed within the timeframe directed by the court. Consequently, the preliminary objection is hereby dismissed.

Counsels' Contentions

[19] In opposing the application, the defendant's counsel, RK Sharma, contends as follows:

(i) that the winding-up will succeed as the 2023 adjudication decision has not been set aside;

(ii) that such debt is not disputed;

(iii) although the plaintiff claims to be able to pay but they just simply refused to do so;

(iv) the plaintiff did not come with clean hands. A previous adjudication decision dated 5 May 2020 ("2020 adjudication decision") is referred to wherein it is alleged that the plaintiff has a tendency of deliberately causing hardship and depriving the defendant of its fruits of litigation by delaying payment towards the resultant costs orders of the High Court dated 9 December 2020 for the sum of RM20,000. The delay necessitated the filing of a garnishee proceeding against the plaintiff, which were subsequently postponed due to cheque clearance issues; and

(v) they are entitled to reject the tender of the cheque for the partial payment of the adjudicated sum and insist on the full sum to be paid on or before 15 September 2023; and therefore, failure to satisfy the sum of RM93,180.53 by the due date entitles them to file the winding-up petition.

[20] The case of *Likas Bay Precinct Sdn Bhd v. Bina Puri Sdn Bhd* [2019] 3 CLJ 499; [2019] 3 MLJ 244 is cited to argue that armed with the 2023 adjudication decision, the defendant is entitled to proceed with winding-up action without the need to register the same under s. 28 of the CIPAA.

[21] The defendant argues that as per the cases of *Pengkalen Holiday Resort Sdn Bhd v. Perbadanan Pengurusan Paradise Lagoon Apartment (North) & Anor* [2016] CLJU 1114; [2016] 1 LNS 1114; [2016] MLJU 939, *Klass Corporation (M) Sdn Bhd v. MKRS Management Sdn Bhd* [2018] 7 CLJ 303; [2018] 9 MLJ 305, and *SME Majujaya Sdn Bhd v. Oon Brothers Electrical Trading Co Sdn Bhd* [2018] CLJU 945; [2018] 1 LNS 945; [2018] MLJU 899, even if the plaintiff is found to be solvent, their refusal to fulfil the demanded amount cannot serve as grounds to deny the defendant's right to initiate winding-up proceedings against them.

[22] The defendant further relies on the case of *Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd* [2002] 1 CLJ 566; [2002] 1 MLJ 33 and argues that the plaintiff did not come with clean hands. This is on the grounds of the aforesaid previous conduct in which they are alleged to be in the habit of forestalling and dragging payment to the last minute and causing the plaintiff to incur unnecessary costs in enforcing the judgment and cost orders obtained.

[23] Learned counsel for the plaintiff, Lee Kai Jun, argues that the application should be allowed based on the following:

(i) the 2023 adjudication decision is liable to be set aside pursuant to s. 15 of the CIPAA as the adjudicator had acted in excess of jurisdiction and breach of natural justice;

(ii) the plaintiff has a greater cross-claim of RM49,034,197.38 wherein they have commenced both CIPAA as well as arbitration proceeding against the defendant;

(iii) the proper avenue for the defendant is to resort to s. 28 of the CIPAA *ie*, by applying to the court for registration of the 2023 adjudication decision;

(iv) the continuation of the winding-up petition will cause irreparable damage to the plaintiff;

(v) the winding-up petition filed by the defendant has no chance of success as payment was made wherein the overdue sum fell below the statutory threshold;

(vi) such steps in rejecting the plaintiff's payment amounts to an abuse of proceedings as the resultant petition is utilised as an enforcement and execution proceeding; and

(vii) the court is not precluded from granting an injunction against advertisement or gazettal of the petition even after the winding-up petition is filed.

[24] Central to the plaintiff's argument is their reliance on the Singapore Court of Appeal case of *Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd (Formerly Known As Tong Teik Pte Ltd)* [2021] SGCA 60; [2021] 2 SLR 478 wherein they argue that a debtor company may decide to pay in order to reduce the outstanding sum below the threshold, wherein such action would defeat the statutory presumption of the company's inability to pay. Applying this principle to the facts of the case, it is argued that the winding-up court has no jurisdiction to wind-up the plaintiff upon the plaintiff's payment, which effectively reduced the sum due below RM50,000.

[25] Further, the plaintiff referred to the case of *Wangsini Sdn Bhd v. Grand United Holdings Bhd* [1997] 5 CLJ 664; [1998] 5 MLJ 345, wherein it was held that a creditor is not entitled to reject the cheque issued for a lesser sum as the said sum is permitted by the court-approved scheme of arrangement. Thus, the winding-up petition for a higher sum was dismissed on the grounds that the debtor was able to pay the sum sanctioned under the scheme. Drawing inference to this case, the plaintiff argues that they had went beyond tendering the cheque. It was in fact, deposited and cleared into the defendant's account. As such the plaintiff had legally tendered the sum of RM51,894.80 thereby reducing the outstanding amount to RM41,285.73, which is well below the statutory threshold of RM50,000. It is argued that the defendant's subsequent act of refunding the said sum does not alter the fact that payment was tendered up to the said sum.

Findings And Decision

General Principles

[26] The *Fortuna* injunction is derived from the Australian case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner Of Taxation Of The Commonwealth Of Australia* [1978] VR 83 where it is essentially a prohibitory injunction catered to restrain the presentation of a winding-up petition or prohibiting further steps in an existing winding-up petition with the aim of prevention of abuse of the process of court.

[27] The Court of Appeal in *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 MLJ 316 approved the principles enunciated in *Fortuna* case. The applicable principles were then succinctly summarised in the case of *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947, wherein an applicant seeking a *Fortuna* injunction will have to satisfy the following:

(i) first branch of the principle

(a) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and

(b) the presentation of such petition (which has not chance of success) might produce irreparable damage to the company.

(ii) second branch of the principle

(a) whether a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

Whether The Defendant Should Register The 2023 Adjudication Decision

[28] Contrary to the plaintiff's stand, I am of the view that there is no necessity for the defendant to register the 2023 adjudication decision prior to the filing of winding-up petition against the plaintiff. I am bound by the Court of Appeal case of *Likas Bay Precinct Sdn Bhd v. Bina Puri Sdn Bhd* (*supra*), in that the non-registration to enforce the CIPAA decision would not be considered a *bona fide* dispute of the sum claimed therein. In the said case, Abang Iskandar JCA (as His Lordship then was) held as follows (at pp. 508 to 509 (CLJ); pp. 253 to 254 (MLJ)):

> [20] Now, compared to the situation obtaining in the instant appeal before us, it was worthy of note that *the debt which was the central factum of the petition had been subjected to a mutually agreed specialised litigation between the parties, albeit by way of an adjudication proceeding which had resulted in a decision by the adjudicator dated 31 December 2016.* That adjudication decision in favour of the respondent petitioner had thereby evinced the fact that an amount as stated in the said adjudication decision was due and owing to the respondent from the appellant. *There was no application by the appellant to set aside the said adjudication decision. In the premises, we were of the view that such an adjudication decision was good and proper as a basis upon which a winding up petition notice against the appellant may be filed for a debt in the amount as stated in the said adjudication decision against the appellant.* Armed with an adjudication decision, as it were, the respondent petitioner in the instant case stands on a stronger footing than a petitioner, say in the *NCK Wire Products Sdn Bhd* case. As such, we were inclined to agree with the proposition that, for the purpose of filing a notice to wind up under s. 465 of the Companies Act 2016, a successful litigant in an adjudication proceeding need not have to register the said adjudication decision under s. 28 of the CIPAA. As was stated with clarity by the Supreme Court Justices in the *Morgan Guaranty Trust* case having approved of Crossman J decision in *Re North Bucks Furniture Depositories Ltd*, namely, that the term 'creditor' 'includes every person who has the right to prove in winding-up'. It is without doubt that the respondent petitioner was a creditor to

whom the appellant had been adjudicated to have owed monies to. And, *prima facie*, a creditor who is not paid, has a right to file a petition to wind up the debtor company. (emphasis added)

Whether The Plaintiff Came With Clean Hands

[29] The clean hands rule was explained long ago in the case of *Holman v. Johnson* (1775) 1 Cowp 341, wherein Lord Mansfield CJ set out the rationale for the illegality doctrine:

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; *ex dolo malo non oritur actio* ("no action arises from deceit"). No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiffs own standing or otherwise, the cause of action appears to arise *ex turpi causa* ("from an immoral cause"), or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both were equally in fault, *potior est conditio defendentis* ("stronger is the position of the defendant").

[30] In the case of *Dering v. Earl Of Winchelsea* [1787] 1 Cox Eq Cas 318, it was held that equity will not apply the principle of clean hands "unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for".

[31] There is no fixed rule or standard of conduct required. The UK House of Lords in the case of *Grobbelaar v. News Group Newspapers Ltd & Anor* [2002] 4 All ER 732 reiterates the principle that the conduct must relate to the remedy sought to be obtained. In the said case, Lord Scott held as follows:

... it is long-established practice that an equitable remedy should not be granted to an applicant who does not come before the court with 'clean hands'.

The grime on the hands must, of course, be sufficiently closely connected with the equitable remedy that is sought in order for an applicant to be denied a remedy to which he ordinarily would be entitled. And whether there is or is not a sufficiently close connection must depend on the facts of each case.

[32] The principle of "coming to court with clean hands" is indeed an essential rule in injunction cases. It essentially refers to the requirement that an applicant seeking an injunction must be free from any wrongdoing or

misconduct related to the subject matter of the case. "Unclean hands" encompass a variety of behaviours or actions that could be deemed as improper or unethical. This may include but is not limited to:

(i) fraud or deceit in the transaction or matter at issue;

(ii) misrepresentation of facts to the court;

(iii) breach of contractual obligations or legal duties;

(iv) unjust enrichment at the expense of the other party; or

(v) engaging in unconscionable conduct.

[33] In this case, the plaintiff's habit of delaying payment in matters relating to their failure to register and enforce the 2020 adjudication decision has no immediate relation to their decision to partially pay for the 2023 adjudication decision and thereafter seeking to injunct the defendant from winding them up. Even if it is to be construed in its general sense, *ie*, plaintiff in the habit of delaying payment; I am of the view that such delay, *albeit* frustrating and annoying, is part of normal litigation process and does not constitute a deliberate attempt to manipulate the matter at issue or to gain an unfair advantage. Simply because the plaintiff has behaved poorly does not necessarily mean that they have dirtied their hands. Thus, I am of the view that such conduct on its own sets of facts does not violate the "clean hands" principle.

Whether The Petition Has No Chance Of Success

[34] On the issue of the petition's chance of success, the first question is whether the defendant is entitled to reject the delivery of the payment cheque which was issued by the plaintiff. Based on the rule established in the case of *Polglass v. Oliver* (1831) 2 Cr & J 15; [1831] EngR 176, if the creditor objects to the tender of a cheque, then the objection must be to the form of tender. If the objection is for any other reason, then the tender of a cheque is a valid tender.

[35] In our case, the defendant had actively refused the plaintiff's delivery of the sum due as the cheque issued was for a lesser sum. Nevertheless, the defendant did not object on the form or mode of payment. According to s. 31(3) of the Bills of Exchange Act 1949 ("BEA") "a bill payable to order is negotiated by the indorsement of the holder completed by delivery". Delivery under s. 2 of the BEA means "transfer of possession, actual or constructive, from one person to another". Here, despite the active refusal by the defendant's solicitors to accept delivery, the plaintiff took steps in directly depositing the said cheque into the defendant's bank account. I am of the view that such action amounts to delivery under s. 2 of the BEA; wherein the subsequent clearing process by Bank Negara's cheque truncation and conversion system (CTCS) or eSPICK amounted to presentment for

acceptance under s. 45 and s. 74A of the BEA. Therefore, tendering the cheque by depositing it into the CDM constitutes valid delivery and presentment, reaffirming the plaintiff's assertion that they have effectively made a partial payment, reducing the outstanding sum to RM41,285.73.

[36] Having established that the defendant had no right of rejection, we now focus on the issue of when payment took place. The use of ancient Persian *cak*, which could be considered an early form of cheque or promissory note, dates back to the Achaemenid Empire, which ruled Persia from approximately 550 to 330 BC. During the Mauryan period (321 to 185 BC), Indians utilised a commercial instrument known as *adesha*; whilst the Romans (31 BC to 476 AD) employed *praescriptiones*. In the ninth century, the Persian *cak* was adopted by the Abbasid Caliphate as *sakk* wherein a Muslim merchant in one country could cash a *sakk* drawn on his bank in another country. Around 1430, during his visit to Malacca, Ma Huan documented the earliest written account of such a 'bank' in our shores. This account is found in *Ying Yai Sheng Lan* ("*Overall Survey of the Ocean's Shores*") (published in 1451), where he described a place where foreign traders could access their cash. This facility was housed in a fenced-up building within a guarded and gated compound situated between the Malacca River and the Sultan's palace. As per Kung Chen's account in his book *Hsi Yang Fan Kuo Chih* ("*Records of the Western Barbarian Countries*") (1434), Chinese traders identified this gated and guarded area within the Malacca port as the 'foreign prefecture'.

[37] The utilisation of *sakk* by Muslim traders spread into Southern Europe, and it was not until the 17th century that the concept of a "cheque," as we now understand it, emerged. The earliest known cheque dates back to 1659, when one was issued for £400. Signed by Nicholas Vanacker, it was made payable to Mr Delboe and drawn on Messrs Morris and Clayton, scriveners and bankers located in the city of London. This innovative financial tool not only streamlined trade but also alleviated the burden on merchants, sparing them the necessity of transporting cumbersome quantities of currencies for transactions. What unites all these early forms of cheque usage is their acceptance as payment upon being tendered despite the fact it would take some time to extract the actual cash from the drawee bank.

[38] This primary function of cheques is illustrated in the case of *Bottomley The Younger v. Robert Nuttall* [1858] 5 CB (NS); [1858] EngR 1197, wherein the plaintiff had drawn a bill of exchange which had been accepted by a member of a firm. In the course of the judgment, Cockburn CJ said (at p. 139):

> It is true the acceptance operates a suspension of the drawer's remedy until the maturity of the bill; but, the bill being unpaid when it becomes due, the drawer may treat it as a waste-paper, and proceed for the original consideration.

[39] In the same case, Williams J held (at p. 144) that acceptance of a bill or note operates as a 'conditional payment'. Whilst Byles J said (at p. 148):

> ... it is the first learning that taking a bill for and on account of a debt does not operate as an absolute discharge of the debt. At most it is only a conditional payment, which defeated by the subsequent dishonor of the bill whether total or partial.

[40] It is clear that the judges in *Bottomley The Younger v. Robert Nuttall* (*supra*) considered that 'conditional payment' meant that the debt had been paid subject only to the condition that the bill be met on presentment.

[41] In the case of *Homes v. Smith* [2000] Lloyd's Rep Bank 139, this principle was applied by the English Court of Appeal wherein it was held that where there is a deadline, payment is timely if the cheque is tendered and accepted before the deadline in spite of the fact that the cheque could not be presented for payment before the deadline. The court thus summarises the concept as follows:

> Where a cheque was offered in payment, it amounted to a conditional payment which, if accepted, operated as a conditional payment from the time when the cheque was delivered. If the cheque was not met on presentation, the payment was subject to a condition subsequent which meant that the sum which had been due became due once more.

[42] Even more dramatically, in the case of *Petroleo Brasileiro SA v. ENE Kos 1 Ltd* [2009] EWCA Civ 1127, a cheque handed in at 4.30pm was held to be a timely payment when the deadline based on the order of conditional leave to defend was at 5pm.

[43] Applying these principles to the current situation, I am of the view that the payment by the plaintiff is complete at the time when the cheque was deposited into the CDM maintained by the defendant's bankers *ie*, at 6.35pm on Friday, 15 September 2023. This is well before the expiry of the 21-day period which takes place at 12 midnight on the same day. It does not matter that presentment and clearance of funds took place a few days after it was delivered and/or tendered. The defendant's act of 'refunding' the sum indicates that the said cheque had indeed cleared into their bank account. As such, it is not disputed that the condition under the cheque rule is met and the sum of RM51,894.80 is deemed paid on 15 September 2023.

[44] The next question is whether the winding-up petition would inevitably fail as the debt fell below the statutory threshold. Our previous statutory thresholds of RM500 and RM10,000 were relatively low wherein there was no point for a company to partially pay their debts to these figures to avoid being wound up. However, the increase in the threshold to RM50,000 pursuant to *Gazette* Notification No. 4159/2021 effective 1 April 2021 represents a significant policy adjustment that alters the landscape. The

solicitors for the plaintiff argue that this change signifies a substantial shift wherein it is now legally possible to evade winding-up by reducing the debt below the sum of RM50,000 before the expiry of the 21-day notice period.

[45] Reliance is made on a Singapore Court of Appeal case of *Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd (Formerly Known As Tong Teik Pte Ltd)* [2021] SGCA 60; [2021] 2 SLR 478, wherein the plaintiff argues that a company may decide to pay such sum to make the outstanding falls below the threshold, wherein such action would defeat the statutory presumption of the company's inability to pay. The following *obiter dicta* passage by Judith Prakash JCA is highlighted by the plaintiff:

> [102] Finally, Prof Flo (Minister of State for Law) also stated that the increment of the debt limit in s. 254(2)(a) of the Companies Act was to "strike a proper balance between the interests of debtors and creditors" (Second Reading at col 2187). This shows that the higher debt limit was intended to offer greater protection to the debtor company while also balancing the interests of creditors. It can be inferred from this that the debt limit of $10,000 was intended to be a form of safe harbour, so that as long as a company's debt did not exceed $10,000, it should not be deemed to be unable to pay its debts. Consistent with this intention, Parliament must also have intended that if a company pays up a debt in part upon service of the statutory demand such that it falls below $10,000, it should not be deemed to be unable to pay its debts.
>
> [103] *Accordingly, in our opinion, a company that pays the debt demanded in a statutory demand in part within the prescribed period such that the remaining amount payable falls below $10,000 should not be deemed to be unable to pay its debts pursuant to s. 254(2)(a) of the Companies Act.* (emphasis added)

[46] Apart from identifying the need for this 'safe harbour', the panel of the Singapore Court of Appeal, chaired by Sundaresh Menon CJ, went through the legislative history pertaining to the applicable threshold and found support for the view that a company will not be deemed to be unable to pay its debts as long as the outstanding debt fell below the statutory threshold during the prescribed 21-day period. This inference was drawn from the successive and continual increments of the statutory threshold legislated by Parliament which showed that Parliament did not want companies to be deemed to be unable to pay their debts if the outstanding debt was too low in light of current economic conditions and inflationary trends (at para. 97). Inference was also drawn from the successive increment for bankruptcy threshold (at para. 101).

[47] Further, the entitlement of a debtor to pay its debt up to the limit allowed is seen in the case of *Wangsini Sdn Bhd v. Grand United Holdings Bhd* (*supra*). In the said case, the respondent was legally obliged under the terms of the scheme of arrangement to pay a sum of RM33,887.50 to the petitioner. A cheque for the said amount was handed to the petitioner's solicitors in January 1996, but it was subsequently returned to the respondent. The

petition, which was filed three months later, was dismissed on the grounds that it was oppressive in light of the scheme of arrangement wherein the cheque, though not presented for encashment, shows that the respondent was able to pay the quantum sanctioned by the scheme.

[48] Back to our situation, s. 466 of the Companies Act 2016 comprehensively addresses the scenario where a debtor company faces an "inability to pay debts," constituting one of the grounds specified in s. 465(1)(e) for initiating winding-up proceedings against said debtor company. The decision to enact the increase from RM10,000 to RM50,000 was made by the Minister of Domestic Trade and Consumer Affairs, exercising the authority vested in s. 466(1)(a). This alteration, formalised by *Gazette* Notification No. 4159/2021, essentially perpetuates the temporary measure initiated by *Gazette* Notification No. 21841/2020 on 30 December 2020, which temporarily raised the threshold to RM50,000 from 1 January 2021 to 31 March 2021. It supersedes the previous threshold of RM10,000 set by the 2017 threshold order. Moreover, amidst the challenges posed by the COVID-19 pandemic, additional measures were introduced. The Companies (Exemption) (No. 2) Order 2020 extended the timeline for serving notices of demand to six months, applicable from 23 April 2020 to 31 December 2020.

[49] I believe that this strategic adjustment in the winding-up threshold aligns with a broader policy objective. By focusing on more substantial debts, it aims to strike a balance between creditor protection and the preservation of business continuity. This policy initiative eventually led to a drop in winding-up petitions lodged with the Companies Commission of Malaysia (CCM) in 2021 till 2023, compared with 2019 and 2020. Based on CCM's statistics, it is observed that in 2019, a total of 1,968 winding-up petitions were lodged, with the number roughly maintained at 1,919 in 2020. According to CCM, the figure dropped to 1,113 in 2021, 1,332 in 2022, and 1,261 in 2023.

[50] In my assessment, if the changes had not been implemented, there would have been a significant increase in the number of winding-up petitions starting from 2020, particularly due to the economic strains induced by the COVID-19 pandemic. Companies faced unprecedented challenges during and post-pandemic, including disruptions in supply chains, reduced consumer demand, forced closures, and financial instability. These factors contributed to many businesses struggling to sustain operations and meet financial obligations, ultimately leading to an elevated risk of insolvency and winding-up petitions. These adjustments highlight a proactive response to economic challenges, with the primary objective being the establishment of a practical framework that protects the interests of creditors while ensuring the sustainable functioning of businesses.

[51] Given the increase in the statutory threshold aimed at mitigating the economic impact of the COVID-19 pandemic, it stands to reason that the purposive interpretation of such legislation is to facilitate partial payments, offering companies a chance to sidestep winding-up proceedings if the debt is reduced during the 21-day notice period. A creditor, therefore, cannot effectively refuse partial payment as such payment is made in accordance with the law. Therefore, I am of the considered view that the plaintiff's part payment towards the statutory demand, causing the outstanding debt falling below the statutory threshold before the expiry of the 21-day notice period, would result in s. 466(1)(a) of the Companies Act 2016 no longer being a valid ground to wind up its entity. Hence, the petition filed by the defendant against the plaintiff is bound to fail.

Whether The Continuation Of Such Petition Might Produce Irreparable Damage To The Plaintiff

[52] It is contended by the plaintiff, that in the event the winding-up petition is advertised, it will cause irreparable damage to the plaintiff as:

(i) the plaintiff is a solvent company actively trading in the construction industry;

(ii) the plaintiff's facility with the banks and/or the supplier will be frozen, recalled or defaulted in the event of the advertisement of the winding-up petition;

(iii) the plaintiff will also face difficulty in paying employees' salary;

(iv) the plaintiff's business will be badly affected and the presentation of winding-up petition may be a serious breach of the construction contract that the plaintiff entered into; and

(v) the plaintiff's name and reputation in the construction industry would be badly affected.

[53] This argument is backed by documentary evidence that the plaintiff is a going concern. For the financial year end of 31 December 2022, the plaintiff has a revenue of RM8,797,199 and there are also several unsatisfied open charges with UOB Bank. The plaintiff's current assets as at 31 December 2022 stood at RM30,797,728; whilst their non-current asset stood at RM230,563.

[54] There has been judicial recognition of the prejudice and irreparable harm which the commencement of a winding-up petition would inflict upon the debtor company. The following authorities will probably serve as a timely reminder of the severe or fatal blows the debtor company would face upon or shortly after the commencement of the winding-up petition:

(i) in *Sanjung Suria Sdn Bhd v. PLB-KH Bina Sdn Bhd* [2013] CLJU 1004; [2013] 1 LNS 1004; [2014] 7 MLJ 125, S Nantha Balan JC (as His Lordship then was) held that the damage consequent upon winding up would be irreparable and any restoring of *status quo* may be forever altered by the winding-up:

> [54] Also, *I was mindful of the fact that if a Fortuna injunction is disallowed, then that would result in incongruity and would not be in keeping with the comity of judicial orders and a decision to disallow a Fortuna injunction, would in my view render the stay order given by the other court as an inefficacious and impotent judicial pronouncement. Such an outcome should wherever possible, and depending in the circumstances, be avoided.*
>
> ...
>
> [57] Hence, if PKBSB is allowed to present the winding up petition and SSSB is thereafter wound up and the appeal to the Court of Appeal eventually succeeds, SSSB may not be restored to *status quo*. *The damage to SSSB consequent upon winding up would for may quite possibly) be irreparable and it would idle to speak of any restoring of status quo as it may be forever altered by the winding up. These are important and imperative considerations that must be kept in mind in dealing with an application of this type.* (emphasis added)

(ii) in *Metalform Asia Pte Ltd v. Holland Leedon Pte Ltd* [2007] SGCA 6, Chan Sek Keong CJ held as follows:

> [65] In *Bayoil*, Nourse LJ held that neither the potential commercial insolvency of the company nor the ability of the petitioning creditor to levy execution against the company amounted to a special circumstance that entitled him to have it wound up. He explained the rationale thus (at 382):
>
> > *[A]n order that a company be wound up, unlike a bankruptcy order, is often a death knell. Nor can it be certain that a liquidator, even with security behind him, will prosecute the company's claims with the diligence and efficiency of its directors.*
>
> [66] Ward LJ, agreeing with Nourse LJ, gave the following reasons:
>
> (a) s. 125 of the UK Insolvency Act 1986 [which corresponds to s. 257(1) of the Act] dealing with the 'Powers of court on hearing of petition' gave the court a wide discretion, which must be exercised judicially;
>
> (b) both *Portman* and *Wools* were authorities, from which the Court of Appeal should not depart, that winding up should not be allowed where there was a genuine cross-claim, except in special circumstances;
>
> (c) there was a little difference between the disputed debt and a cross-claim which did not constitute a set-off-citing the Privy Council's statement in *Malayan Plant*; and

(d) *a winding-up order was a draconian order: if wrongly made, the company had little commercial prospect of reviving itself and recovering its former position. If there was any doubt about the claim and the cross-claim, the court should proceed cautiously.*

...

[82] In our view, we do not think that these matters outweigh the policy consideration that the commercial viability of a company should not be put in jeopardy by the premature presentation of a winding-up petition against it where it has a serious cross-claim based on substantial grounds. *Such a petition may adversely affect the reputation and the business of the company and may also set in motion a process that may create cross-defaults or cut the company off from further sources of financing, thereby exacerbating its financial condition. So long as the court is satisfied that on the evidence there is a distinct possibility that the cross-claim may exceed the undisputed debt, it should give the company the opportunity to prove its claim rather than to allow a winding-up petition to be filed, with all the normal consequences attendant upon the filing of such a petition. Businesses that have a chance of recovery should not be pushed into a state that makes it difficult for them to recover.* (emphasis added)

(iii) in *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* (*supra*), the Court of Appeal quoted the following judgment of McGarvie J in *Fortuna Holdings Pte Ltd v. The Deputy Commissioner Of Taxation Of The Commonwealth Of Australia* (*supra*):

The law has long recognized that with proceedings to wind up a company, intervention after the commencement of proceedings would often be too late to relieve the company of oppression and damage. The courts have recognized that irreparable damage may be done to a company merely through public knowledge of the presentation of a petition. Usually the damage flows from the loss of commercial reputation which results. The courts have also been conscious of the pressure which may be put on a company, by a person with a disputed claim against it, threatening to present a winding up petition unless the company meets his claim. While that threat exists, the company, in order to avoid the damage involved in the presentation of a petition, is pressed to meet the claim although it may have substantial and genuine grounds for regarding itself as not required to do so. (emphasis added)

[55] In light of the facts of this case, I am of the view that the first branch of the principle as enunciated in the *Fortuna* case (*supra*) as refined by *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* (*supra*) has been satisfied. Namely, the petition has no chance of success, as a matter of law as well as a matter of fact; and that the continuation of such petition might produce irreparable damage to the company. A just and equitable balance has to be struck between the rights of the defendant in collecting their cash flow expeditiously and the rights of the plaintiff to make the necessary payment to reduce their debt to avoid being wound up. The *Fortuna* injunction should

also preserve the defendant's right to enforce the 2023 adjudication decision by applying to the High Court for an order to enforce the same pursuant to s. 28 of the CIPAA, and the right to execute the same in accordance to O. 45 to 51 of the Rules of Court 2012.

Whether There Is A Cross-claim Or Counterclaim

[56] In this case, the plaintiff argues that they have a greater cross-claim of RM49,034,197.38 for liquidated damages and back charges based on a separate construction project wherein the plaintiff had commenced both arbitration and CIPAA proceedings against the defendant. In particular, the plaintiff was awarded the sum of RM14,990,503.60 on 6 May 2020 (the 2020 adjudication decision) (pdf pp. 99 to 134 of encl. 3). Nevertheless, the registration of the said 2020 adjudication decision was disallowed by the High Court; wherein the Court of Appeal had on 15 September 2023 affirmed the High Court's decision. The plaintiff claims that this was due to the fact that the adjudicator had acted in excess of jurisdiction as the plaintiff's claim is in the nature of damages and not for works done or services rendered pursuant to construction contract. As to the remaining sum, the defendant acknowledges that there was a notice of arbitration issued in on 23 October 2019 (pdf pp. 76 to 97 of encl. 3). Nevertheless, the defendant claims that up till now no arbitrator has been appointed and hence, question the genuineness of the plaintiff's intention to arbitrate.

[57] From the facts, although the plaintiff argues that the 2023 adjudication decision is being challenged, there is no evidence that such a challenge is being made. In any event, I am guided by the Court of Appeal decision in *Sime Darby Energy Solution Sdn Bhd v. RZH Setia Jaya Sdn Bhd* [2021] 9 CLJ 880; [2022] 1 MLJ 458 that an application to set aside an adjudication decision would not be considered a *bona fide* dispute of the debt claimed by the creditor.

[58] As the registration of the plaintiff's 2020 adjudication decision has been disallowed, their reliance is mainly on the issue of the intended arbitration, which they may decide to pursue upon the registration of their 2020 adjudication decision being rejected by the Court of Appeal on 15 September 2023.

[59] The court in the case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner Of Taxation Of The Commonwealth Of Australia* (*supra*), held that a cross-claim is treated as a matter which is proper for consideration in the exercise of their discretion to order winding-up, and in dealing with the considerations relevant to their exercise of discretion on a winding-up petition, the courts have looked at the substance and not the form of the cross-claim. The court was not concerned to distinguish whether the cross-claim was a set-off or a counterclaim or some other form of cross-claim. Nevertheless, the courts have approached this situation in the following manner:

(i) the genuineness of the cross-claim *ie*, whether it is genuine based on substantial grounds; and

(ii) whether the continuation of the winding-up petition would cause irreparable damage to the applicant.

[60] In the case of *Josu Engineering Construction Sdn Bhd v. TSR Bina Sdn Bhd* [2013] 9 CLJ 650; [2014] 11 MLJ 916, Mary Lim J (as she then was) summarised the considerations to be taken into account in a *Fortuna* injunction application where the applicant has raised a cross-claim but does not dispute the creditor's debt:

> [49] From the above cases, it can first of all be said that where a debt is undisputed, an injunction to restrain the presentation of a petition to wind up a company upon failure to pay upon the debt demanded is generally refused. The arguments challenging the issuance of the s. 218 notice should also be made in the winding up court. Otherwise, the only viable option is to pay up. Secondly, where a debt is undisputed, an injunction may nevertheless be ordered where a genuine cross-claim based on substantial grounds is raised. In such a case, the courts recognise that the presentation of such a petition might produce irreparable damage to business and reputation. Thirdly, the burden of proof in both instance of disputed debt and undisputed debt is whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made; as opposed to a test that the petition is bound to fail.

[61] Hence, the issue of whether there is a *bona fide* disputed debt does not appear to be a consideration in this situation and what the plaintiff in this case needs to show is that:

(i) the continuation of the winding-up petition may cause irreparable damage to the plaintiff; and

(ii) the likelihood of the said petition may fail or that it is unlikely that a winding-up order would be made based on the circumstances.

[62] Be that as it may, I am of the view that the facts of the case do not support for the second branch of the principle as enunciated in the *Fortuna* case (*supra*) as refined by *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* (*supra*). In essence, the plaintiff is unable to show that there is a *bona fide* dispute as to the 2023 adjudication decision. They are equally unable to justify a counterclaim or a cross-claim based on their purported claim of RM49,034,197.38 for liquidated damages and back charges as they did not proceed with arbitration proceedings despite intimating to do so in 2019. Their reliance would be only on the first branch of the *Fortuna* case.

Whether Injunction Can Be Granted Against Advertisement Or Gazettal Of The Petition After The Filing Of The Winding-up Petition

[63] Although not raised by the defendant, the plaintiff drew this court's attention to the decision in *Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 391; [2002] 4 MLJ 390 wherein it was held that once a winding-up petition is filed, the court is precluded from granting an injunction against advertisement or gazettal of the petition. This principle has been cited with approval by the Court of Appeal in *People Realty Sdn Bhd v. Red Rock Construction Sdn Bhd* [2008] 1 CLJ 632; [2008] 1 MLJ 453. This decision was applied in the case of *United Malaya Stores Sdn Bhd v. S Selapa Sivalingam & Anor* [2022] 6 CLJ 469, wherein Liza Chan Sow Keng CJ (as Her Ladyship then was) refused the plaintiff's application for *Erinford* injunction upon dismissing their *Fortuna* injunction.

[64] I am in agreement with the plaintiff's submission that the case of *Azman & Tay Associates Sdn Bhd* (*supra*) was decided *per incuriam* based on the following observations:

(i) Vincent Ng J (as His Lordship then was) reasoned that the requirement of advertisement is merely a directory for Australian and English jurisdiction due to the operating sentence unless the court otherwise directs/orders:

> Hence, clearly, in both Australian and English (after 1979) jurisdictions due to the particular wording in the proviso "unless the court otherwise directs/orders", the requirement of publication and gazetting of the petition has never been construed by the English and Australian courts as mandatory – only directory. Whereas r. 24 of our Rules makes mandatory the publication and gazettal of the petition, as it is couched as "every petition shall be advertised (in Form 4) seven clear days or such longer time as the court may direct before hearing" ...

(ii) the learned judge had overlooked that a similar operating sentence of "unless the judge or the Registrar shall otherwise direct" was similarly provided in r. 24 of the Companies (Winding-up) Rules 1972, thus rendering the requirement of advertisement directory and not mandatory:

> Rule 24: Advertisement of Petition
>
> Every petition shall be advertised in Form 4 seven clear days or such longer time as the Court may direct before the hearing, as follows:
>
> (a) once in the *Gazette* and twice at least in two local newspapers circulating in Malaysia or in such other newspapers as the Court may direct;

(b) the advertisement shall state the day on which the petition was presented and the name and address of the petitioner and of his solicitor and local agent (if any) and contain a note at the foot thereof, stating that any person who intends to appear on the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner or to his solicitor or local agent, within the time and in the manner prescribed by rule 28, and an advertisement of a petition for the winding-up of a company by the Court which does not contain the note shall be deemed irregular;

and if the petitioner or his solicitor does not within the time hereby prescribed or within such extended time as the Registrar may allow duly advertise the petition in the manner prescribed by this rule the appointment of the time and place at which the petition is to be heard, shall be cancelled by the Registrar and the petition shall be removed from the file **unless the Judge or the Registrar shall otherwise direct**. (emphasis added)

[65] Upon the court's further research on this issue, it is interesting to see how similar provisions within the Companies (Court) Rules 1959 (of India) were construed more than six decades ago by the Punjab-Haryana High Court in the case of *Lord Krishna Sugar Mills Ltd & Anor v. Smt Abnash Kaur & Ors* [1961] 31 COM CAS 639. In that case, the relevant provisions within the companies' rules of India state as follows:

Rule 24. Advertisement of Petition

(1) where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or these Rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily news-paper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the Judge,

(2) Except in the case of a petition to wind up a company, **the Judge may, if he thinks fit, dispense with any advertisement required by these Rules.**

Rule 99. Advertisement of Petition

Subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by Rule 24 of these Rules. The advertisement shall be in Form No. 48.

Rule 96. Admission of petition and directions as to advertisement.

Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. **The Judge, may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition.**

A Rule 6. Practice and procedure of the Court and provisions of the Code to apply

Save as provided by the Act or by these Rules, the practice and procedure of the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these Rules. The Registrar may B decline to accept any document which is presented otherwise than in accordance with these Rules or the practice and procedure of the Court.

Rule 9. Inherent power of the Court

Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders C as may be **necessary for the ends of justice or to prevent abuse of the process of the Court.** (emphasis added)

[66] The Punjab-Haryana High Court in the case of *Lord Krishna Sugar Mills Ltd & Anor v. Smt Abnash Kaur & Ors* (*supra*) held as follows:

D [7] The alternative argument has been advanced on behalf of the company either that even on the terms of rules 24 and 96 as they stand the Court has the discretion to refrain from ordering the advertisement of the petition in a fit case or else that in any case rule 9 empowers the Court to refrain from ordering the advertisement of the petition Immediately on admission where the circumstances justify such a course E and it is necessary for the ends of justice.

[8] It certainly appears from the second Part of Rule 24 that in whatever other case advertisement of a petition can be dispensed with it cannot be dispensed with in the Case of a winding up petition but advertisement of the petition is to be ordered automatically immediately on the admission of such a petition. This is clear from the concluding portion of Rule 96 F according to which the Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition.

[9] It is, however, contended on behalf of the respondents, the petitioners in the winding up petition, that the purpose of this part of the rule is G merely to enable the company to be consulted regarding the manner in which the petition is to be advertised, or in other words regarding the selection of newspapers. This contention appears to me to be very doubtful indeed, and it seems to me that it may equally well be for the purpose of allowing the company to raise any preliminary objections it may have regarding the maintainability of the petition. I am of this H opinion because of the serious effects which the advertising of a winding up petition may have on the affairs of even a prosperous company. It may be reasonable to Order the immediate advertisement of a winding up petition in a case where the petition is filed by a creditor on the ground that the company is insolvent and unable to pay its debt, but the position appears to be somewhat different in the case of a company which is I practically a family affair and the petition is by a contributory for winding-up on just and equitable grounds. The effect may be very serious indeed

since the persons who read the advertisement cannot be expected to know what is the nature of the dispute or to realize the difference between a winding-up petition on the ground of inability to pay debts and a winding-up petition based on disputes between share-holders.

[10] In these circumstances I am not prepared to hold that the last part of Rule 96 has the restricted meaning placed on it by the respondents, but in any Case there is Rule 9 which does not appear to have been brought to the notice of the learned Single Judge, and which gives the Judge the widest power to disregard the rules in a suitable case where it is considered necessary for the ends of justice or to prevent abuse of the process of the Court.

[11] I am therefore of the opinion that the advertisement of the petition should be suspended for the time being, at least until the Petitions for revoking the order of admission and for the rejection of the petition on the ground that it has been filed *mala fide* had been disposed of. I would therefore accept the appeal accordingly but make no order as to costs.

[67] The decision in *Lord Krishna Sugar Mills Ltd & Anor v. Smt Abnash Kaur & Ors* (*supra*) has been accepted with approval by the Supreme Court of India in the cases of *National Conduits (P) Ltd v. SS Arora* [1968] AIR 279, and *Cotton Corporation Of India v. United Industrial Bank* [1983] AIR 1272. The Supreme Court of India in *National Conduits (P) Ltd v. SS Arora* (*supra*) set aside the order of the High Court of Delhi and held that the High Court was in error in holding that a petition for winding-up must be advertised even before the application filed by the company for staying the proceeding for the ends of justice or to prevent abuse of the process of the court. The Supreme Court held the view taken by the High Court of Delhi that the court must, as soon the petition is admitted, advertise the petition is contrary to the plain terms of r. 96 and held that:

such a view if accepted, would make the Court an instrument, in possible cases, of harassment and even of blackmail, for once a petition is advertised, the business of the company is bound to suffer serious loss and injury.

[68] Similar to the Indian provision, our r. 24 is to be read together with other provisions within the Companies Act. This would include, *inter alia*, r. 19 and r. 193 of the Companies (Winding-up) Rules 1972; as well as the provision of s. 351, s. 469(3) and s. 470(1) of the Companies Act 2016, which regulates and allows the court to stay or restraint proceedings against the debtor company prior to or during the hearing of the petition. Section 469(3) and s. 470(1) in particular, state as follows:

Powers of Court on hearing of petition for winding up

469. (1) ...

(2) ...

(3) **The Court may,** at the hearing of the petition or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition:

(a) direct that any notice be given or any steps is taken before or after the hearing of the petition;

(b) **dispense with any notices being given or steps being taken which are required by this Act, or by the rules or by any prior order of the Court**;

(c) direct that oral evidence be taken on the petition or any matter relating to the petition;

(d) direct a speedy hearing or trial of the petition or any issue or matter;

(e) allow the petition to be amended or withdrawn; and

(f) **give such directions as to the proceedings as the Court thinks fit**.

Power of the Court to stay or restrain proceeding against company prior to order of winding up.

470. (1) At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court for an order to stay or restrain further proceedings in the action or proceeding, and **the Court may stay or restrain the action or proceeding accordingly on such terms as it thinks fit.** (emphasis added)

[69] Therefore, based on this assessment, I am of the view that this court is not precluded from granting an injunction against the advertisement or gazettal of the petition even after the winding-up petition is filed. I am of the view that the position taken by the High Court in *Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd* (*supra*) that the court must advertise and *Gazette* upon lodgment of the petition is contrary to the plain terms of r. 24 and, in the words of Falshaw J in *Lord Krishna Sugar Mills Ltd & Anor v. Smt Abnash Kaur & Ors* (*supra*), if such a view is to be accepted, it would make the court an instrument, in possible cases, of harassment and even of blackmail, for once a petition is advertised, the business of the company is bound to suffer serious loss and injury.

[70] I am also in agreement with the plaintiff's reliance on the judgment of Ong Chee Kwan JC in *Permata Trans Offshore Sdn Bhd v. New Wing Energy Sdn Bhd* [2019] CLJU 1273; [2019] 1 LNS 1273; [2019] MLJU 922 that a company may nevertheless apply to the winding-up court for the appropriate reliefs and the decision of *Azman & Tay Associates Sdn Bhd* (*supra*) does not mean that the winding-up court cannot grant such injunction. Ong Chee Kwan JC held as follows:

[23] After a winding up petition has been presented, the company may apply to the winding up court who has seized of the matter for appropriate reliefs if it is of the opinion that the petition is an abuse of the court process and or that it will sustain irreparable harm if the petition is permitted to proceed further.

[24] I am conscious that in the judgment of the late Vincent Ng J in *Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd* [2002] 4 MLJ 390 which judgment has been cited with approval by our Court of Appeal in *People Realty Sdn Bhd v. Red Rock Construction Sdn Bhd* [2008] 1 CLJ 632 at 640, His Lordship seemed to suggest that the winding up court is precluded from granting any injunction at all after the presentation of the petition when he stated thus:

...

[25] I do not think that the aforesaid passage by His Lordship Vincent Ng J necessarily means that the winding up court cannot grant an injunction or stay the proceedings or even strike out the winding up petition prior to the hearing of the petition where there is an abuse of process of the court...

[71] Having said the above, Ong Chee Kwan JC continued to hold that there may be rare and exceptional cases that a *Fortuna* injunction can be filed in civil court where it is not expedient or if irreparable harm will be suffered by the company:

[34] Quite apart from the fact that the company has access to the same if not more options before the winding up court to prevent an abuse of the court process, another reason why any application seeking reliefs from the abuse of process should rightfully be made before the winding up court after a winding up petition has been filed is because the applications that are made before the winding up court for an injunction or stay or striking out may be subject to different legal principles from the principles applicable in an application for a *Fortuna* Injunction before a civil court.

...

[37] Whether our courts will follow the decisions in the 2 English Court of Appeal cited remain to be seen. Suffice is it to state that there are sound reasons for the civil courts not to exercise the jurisdiction to grant an injunction after the winding up petition has been presented. *Whilst they may be no jurisdictional bar for the civil courts to grant an injunction after the winding up petition has been filed, it should only be exercised in rare and exceptional cases where it is not expedient or if irreparable harm will be suffered by the company if it is required to file its application for the injunction before the winding up court.*

[38] *There may be occasions where an injunction may be properly granted by the civil courts to restrain a winding up petition that has been filed from proceeding in the winding up court.* An example of such a case is *Celcom (Malaysia) Bhd v. Inmiss Communication Sdn Bhd* [2003] 3 MLJ 178. In that case, an application was taken out by the plaintiff for an injunction to restrain the

A defendant from presenting a winding up petition. This was dismissed by the court. The defendant then filed a winding up petition. The plaintiff appealed against the dismissal of its injunction application and applied for an *Erinford* injunction to restrain the defendant from taking further steps in its winding up petition. This was granted by the court.

(emphasis added)

B

[72] I am of the view that the present case falls within the rare and exceptional case for such injunction may be filed and considered in courts other than the winding-up court. This is so as the defendant's act of refusing payment, and thereafter refunding the sum paid was made in order to maintain their right to file and proceed with the winding-up petition is a clear abuse of process.

C

[73] As highlighted by the plaintiff, the defendant did not promptly inform them of the returned adjudicated sum. This information only came to light two days after the defendant had surreptitiously presented the winding-up petition. This tactic is deemed to be in bad faith, as it is wielded by the defendant as a threat hanging over the plaintiff, like the sword of Damocles, until the full amount due is paid. I am also in agreement with the plaintiff's reference to the Court of Appeal case of *RHB Bank Bhd v. Malaysia Pacific Corporation Bhd & Another Appeal* [2018] 6 CLJ 55; [2018] MLJU 103, wherein steps taken by the defendant in rejecting cheque delivery and thereafter refunding the plaintiff's part payment amounts to an abuse of proceedings as the petition is utilised as an execution or enforcement proceeding.

D

E

Decision

F

[74] I hold that on the facts and circumstances of the present case, the plaintiff has shown that the petition has no chance of success, as a matter of law as well as a matter of fact. The continuation of the winding-up proceeding might produce irreparable damage to the plaintiff.

G

[75] Hence, this court's discretion ought to be exercised in favour of granting an injunction to restrain the defendant from taking further steps in the winding-up petition.

[76] In the premises, this court has granted the order dated 7 December 2023 in the following terms:

H

(i) declaration that the "statutory notice" dated 25 August 2023 issued under s. 466 of the Companies Act 2016 ("the said notice"), which was served on the plaintiff on 25 August 2023 is null and void or otherwise invalid;

I

(ii) an injunction be granted to restrain the defendant from advertising the said Petition No. WA-28NCC-943-09-2023 and to stay the said petition from proceeding;

(iii) an injunction be granted to restrain the defendant from using or relying upon the said notice for the purpose of commencing any winding-up proceeding against the plaintiff until the arbitrator's decision on the plaintiff's cross-claim or set off;

(iv) the sum of RM51,894.80 currently held by the plaintiff's solicitors be released to the defendant forthwith;

(v) the abovementioned orders shall not prejudice any right which the defendant may have in taking execution proceedings for the enforcement of any court judgment which the court may grant to the defendant in the proceeding for the registration of the adjudication decision as a court order or judgment; and

(vi) there shall be no order as to costs.

[77] As to the issue of costs, although the plaintiff has prayed for costs on an indemnity basis, I am unable to grant any costs to the successful plaintiff as I find that the plaintiff could have easily avoided their current predicament by settling the entire outstanding amount. Based on their affidavit they had the financial means to avert the problem by meeting their financial obligations in full. Although it is legally permissible for them to do so, the plaintiff's decision to issue partial payment, thereby reducing the outstanding sum below the RM50,000 threshold, appears to be a deliberate and calculated action leading to their current situation. Awarding costs on an indemnity basis for such a calculated manoeuvre would result in a sum greater than what the defendant received, which is unwarranted.